No. 22,102

22102

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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HARRY SUGARMAN,

*Appellant,*

vs.

JACK B. FORBRAGD, et al.,

*Appellee.*

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APPELLANT'S REPLY BRIEF

Appeal to Review Judgment of the
United States District Court for
the Northern District of California

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GEORGE McKRAY and
SHELDON I. BALMAN
Fox Plaza, Suite 906
Market at Polk
San Francisco, Calif. 94102

Attorneys for Appellant.

SUBJECT INDEX

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APPELLANT'S REPLY BRIEF

A. INTRODUCTORY STATEMENT

With the exception of a few pages the appellee's brief consists of restatement and affirmation of previously advanced positions, rather than a rebuttal of points made in the appellant's opening brief. By discounting arguments as "web-spinning," the appellee avoids the necessity of answering them. Instead the government reiterates its original stand, acceptance of which requires the Court to give judicial blessing to the Food and Drug Administration's exercise of unrestrained authority in the regulation of imports.

The appellant offers the following answers to the positions taken by the appellee.

B. AGENCY DETERMINATIONS REGARDING THE ADMISSIBILITY OF IMPORTS DO REQUIRE THE HOLDING OF A FAIR HEARING IN ACCORDANCE WITH THE ADMINISTRATIVE PROCEDURE ACT.

1. The appellee does not respond to most of the appellant's arguments.

The essential idea of the APA is to provide fair and uniform procedures for the use of federal administrative agencies; it is comparable to a general procedural statute such as the Federal Rules of Civil Procedure. APA provides for basic procedural rights, which should be available to all citizens, regardless of the agency with which they are dealing. Administrative hearings, an important aspect of the process by which the government exercises its power, are by law held according to the procedures of the APA where the specific statute giving jurisdiction to the agency makes provision for a hearing. The appellee would deny all such procedural safeguards, painstakingly constructed by Congress, to any citizen involved in importing goods under the jurisdiction of the Federal Food and Drug Act. The reason for the denial is the absence of the specific word "hearing" in Section 381 (21 *U.S.C.* 381).

The appellee maintains that FDC import provisions, in failing to specify that a fair hearing is required, speak for themselves. The appellant believes that the government has listened only in a very superficial manner. It has refused

to consider universally-accepted rules of statutory construction as a means of ascertaining the meaning and intent of the passage (see pp. 30-36 of appellant's opening brief). It has failed to come to grips with the fact that, in spite of the absence of the *word* "hearing," *all the elements of a hearing are provided for* within the FDC Act import provisions as follows:

1. "notice...to the owner or consignee"
   21 *U.S.C.* 381(a)

2. an opportunity to "appear before the Secretary of Health, Education, and Welfare"
   21 *U.S.C.* 381(a)

3. a "right to introduce testimony"
   21 *U.S.C.* 381(a)

4. a right to introduce a record from hearings examining the reasonableness of regulations affecting the admissibility of imports.
   21 *U.S.C.* 371(g)

The government has neglected to furnish the Court with any explanation as to why the FDA itself ascribes to these enumerated rights the term "hearing" when routinely making use of a form entitled "Notice of Detention and Hearing" in dealing with imports.[1] Moreover, the government fails to comment upon the emptiness and idleness of a procedure which, if interpreted as it desires, represents no more than a "wailing wall" at which the citizen supposedly can express his frustrations.

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1. In actual practice the FDA makes informal records of the import hearings which are sent to Washington, D. C. for review and consideration by officials unknown to appellant (Plaintiff's Exhibit "I-1" pages 53-54).

2. *Wong* shows that the Court will waive the requirements that a "hearing" be expressly provided for in order to apply the APA.

The one argument concerning fair hearings to which the appellee did respond concerned *Wong Yang Sung vs. McGrath*, 339 U.S. 33 (1950) (See opening brief, pp. 25-28). The response included a labelling of the appellant's view of immigration and deportation cases as "distorted." Here the respondent would seem to have overlooked the purpose for which the appellant directed the court's attention to the deportation cases, and to have demonstrated a lack of understanding of appellant's position. The decisions in question were introduced to illustrate instances in which the Supreme Court has disregarded formal and technical requisites for the application of the APA provision to agency hearings. The appellant contended and still contends that, even if the court should interpret Section 381(a) as not formally calling for a hearing, the provisions of APA would still be applicable in view of such decisions as that in the *Wong* case.

As pointed out in appellant's brief, the Supreme Court has come to the conclusion that, in instances where procedural due process compels a fair hearing, such hearing must be granted under the provisions of APA. In the *Wong* case it was decided that a hearing was mandatory in order to protect and preserve the rights of an individual in accordance with the most fundamental tenets of the U.S. Constitution. In

the instant case again we are faced with the violation of the rights of an individual, in that the FDA is attempting to decide upon a matter without giving the individual an opportunity to present his case at a fair hearing, conducted in accordance with the standards of the APA.

The respondents contend and would have this court conclude that the coffee in question was "on the threshold of entry into the United States," and that, consequently, those decisions dealing with immigration cases and the principles announced therein should be controlling. A cursory inspection of this premise reveals its erroneous nature. We are speaking, in the instant case, of property rights of individuals who are citizens of the United States; we are speaking of the property rights of persons, not of coffee beans. We are speaking of the rights of those individuals who are afforded the protection of our laws to their property, and not the right of a sack of coffee beans or a carload of bananas to enter the United States.

3. Where APA safeguards are not applied, abuse of authority can result.

Why does the government attempt to avoid the fair hearing procedures of the APA in the area of import regulations? Certainly it is more convenient for the agency not to have to comply with these safeguards.[2] But isn't greater assurance

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2. *Goldhaft vs. Larrick*, Civ. No. 122-62, D, N.J., Aug. 20,
(Continued on page 6)

of just results more important than convenience? Unrestrained authority in the hands of any government agency, even if wisely used in the majority of cases, is always a danger in that it can be misused. A recent case would seem to illustrate this problem. This case also indicates that the courts have not always bowed before the FDA's claim of absolute discretion over the control of imports, a point to be developed presently.

In *Carl Borchsenius Co. In. vs. John W. Gardner, et al.*, (E.D. La., New Orleans Div., Civil 1968-321, March 15, 1968) the facts were as follows. A shipment of 5,000 bags of coffee arrived in New Orleans. A wharf examination by a United States Food and Drug Inspector disclosed that half the bags of coffee were damaged by contact with water. 2,325 bags were sound and released for entry into the United States. Remaining bags were received for reconditioning by a salvor. Of these 1,730 bags were made sound and thus brought into compliance with the law, and 1,053 bags were not reconditioned due to mold.

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2. (Continued from page 5) 1964 (unreported) is one illustration of the FDA's tendency to avoid APA "complications" where possible. Here the government, in acting on a New Drug Application, asserted that it was exempt from adjudication requirements of the APA on the basis that its "decisions rest solely on inspections, test, or election". 5 U.S.C. §554(a)(5). The District Court held that a "formal, adversary hearing, involving the issue of whether New Drug Authorizations should be continued in force or suspended" was not one to which the exemption was meant to apply. The revocation order was reversed and remanded for a decision made in accord with the APA.

The FDA arbitrarily withheld permission for entry into the United States of the 1,730 bags of sound coffee beans until the owner agreed that the 1,053 bags of the damaged beans be destroyed rather than re-exported. The government argued that Section 801(b) deprived an owner of the choice under Section 801(a) to re-export the rejected coffee beans, and that the District Court had no jurisdiction since the agency was acting within its discretionary authority. The District Court found the FDA was acting beyond its statutory authority and enforced a mandantory injunction requiring the government to release the rejected coffee beans for re-exportation and the sound coffee beans for entry into the United States.

C. JUDICIAL REVIEW IS AVAILABLE IN THE PRESENT CASE BECAUSE THE FDA EXCEEDED ITS STATUTORY LIMITS OF AUTHORITY.

1. Again, appellee either fails to answer or misconstrues appellant's previous arguments.

The appellee's answering brief commences its argument concerning the availability of judicial review, which hinges upon the degree and type of discretion possessed by the FDA, by citing the District Court's opinion "which considered and rejected most of the arguments offered on appeal by appellant." (See appellee's answering brief, p. 14.) In order to set the record straight, the appellant points out that a substantial portion of his opening brief's statements on this subject (pp. 8-21) concerned the decision in *Abbott Laboratories v.*

*Gardner*, 387 U.S. 136 (1967), which was not yet in existence when the present case was decided in the lower court. Nor can the District Court be said to have rejected the arguments of the authorities cited by the appellant, Davis and Jaffe, since it did not mention them. Moreover, the court did not deal with the opening brief's points regarding the implications on the availability of judicial review of the FDC Act's legislative history. Thus it was incumbent upon the appellee to deal with these arguments if they were to be answered at all.

What is the substance of the appellee's arguments?

The first portion of his statement consists of quotes from Section 381(a), and the explanation of them, from the FDA's point of view, which was given during the lower court's proceedings. After introducing another immigration case (see previous discussion, p. 4-5, of this brief), the appellee at last begins to discuss, not an argument made by the opening brief, but rather two cases introduced by it. These cases are *Abbott* and *Toilet Goods Ass'n., Inc. vs. Gardner* (1967) 387 U.S. 158.

The government's brief attempts to limit the implications on APA application by its reading of the import of the two cases. It is true that *Abbott* decided that regulations could be reviewed in a pre-enforcement state. But the major significance of the decision, as borne out by the lengthy quotations of the *Abbott* case found in the appellant's open-

ing brief, is that the judicial review sections of the APA apply to FDA-promulgated regulations. Following from this decision the appellant concluded (p. 13) "The FDA lacks absolute discretion when promulgating regulations; logic dictates that if regulations are reviewable, that determinations also be reviewable." The appellant's arguments on this subject are among the many not spoken to.

Incidentally, the respondents in commenting upon the effect of *Abbott* and *Toilet Goods* state that those cases involved entire industries whereas the instant case does not. Such a contention is manifestly false. For, if determinations under Section 381(a) are held to be subject to judicial review under the APA, every importer of food and drug items in the United States would be affected. But, even if respondents' statement were true, is the right of one individual so insignificant that he would be denied what is justly his, i.e., protection of his right to a fair hearing and judicial review?

2. <u>The Food and Drug Administration does not possess absolute discretion over the admissibility of imports.</u>

In the recent coffee import-export action involving Section 381, *Carl Borchsenius Co., Inc. vs. John W. Gardner, et al., supra,* the District Court said:

> "The Court agrees that generally speaking judicial relief is not appropriate to relieve a party from administrative action if the administrative agency has exercised discretionary authority granted to it under a statute. *Panama Canal Co. vs. Grace Line, Inc.*, 356 U.S. 390, 78 S.Ct. 752, 2 L.Ed. 2d 788 (1958);

*Sugarman vs. Forbragd*, 267 F. Supp. 817 (N.D. Cal., 1967); see also *Magnolia Petroleum Co. vs. Federal Power Commission*, 236 F. 2d 785 (C.A. 5, 1956); *Chernock vs. Gardner*, 360 F. 2d 257 (C. A. 3, 1966); *Ferry vs. Udall*, 336 F. 2d 706 (C. A. 9, 1964), cert. den. 381 U.S. 904. On the other hand it is well settled that judicial relief is appropraite to relieve aggrieved persons from administrative action beyond the statutory grants of authority. In *Stark vs. Wickard*, 321 U.S. 288, 64 S.Ct. 559, 571, 88 L.Ed. 733, the Supreme Court said:

'* * *When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of these agencies is circumscribed by the authority granted. This permits the Courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the Statutes establishing courts and marking their jurisdiction. * * *'

To the same effect *Waite vs. Macy*, 246 U.S. 606, 38 S.Ct. 395, 62 L.Ed. 892 (1918); *Hammond vs. Hull*, 131 F.2d 23 (C.A. D.C., 1942); *Bowman vs. Retzlaff*, 65 F. Supp. 265 (D.C. Md. 1946)."

It is the appellant's view that the facts of *Sugarman vs. Forbragd* warrant its removal from its present position in the above quote to a place alongside of *Waite vs. Macy* and *James J. Hill (Bowman vs. Retzlaff)*, where it would be used to illustrate that "judicial relief is appropriate to relieve aggrieved persons from administrative action beyond the statutory grants of authority."

How does one determine if administrative action has gone beyond statutory limits? This very question was asked of the

present appellee by the District Court in the following interesting exchange (II R. 72-74):

> "THE COURT: All right, gentlemen, why shouldn't I send this case back to the Food and Drug Administration?
>
> MR. ENSIGN: Well, because, Your Honor, the Court doesn't have the power to conduct a judicial review.
>
> THE COURT: Why not?
>
> MR. ENSIGN: Because this is a case where the agency action is committed to the agency discretion.
>
> THE COURT: It says, 'it it appears from the examination...' What does that mean?
>
> MR. ENSIGN: It means that if in the opinion of the Food and Drug Administration, from the examination or otherwise, the article is not fit for food...
>
> THE COURT: How does he exercise that discretion, don't bother me, that stuff burned on the ship, appears to me that's no good, that's the end of it, I don't want to hear any more. I have made my ruling. I have exercised my discretion. You mean to tell me the Food and Drug can go that far, even under import theory?
>
> MR. ENSIGN: Might act beyond the statutory authority, in which case no court would be deprived of the power to conduct a judicial review.
>
> THE COURT: How do I determine whether he acted beyond his statutory authority?
>
> MR. ENSIGN: Well, the complaining party has the right to --
>
> THE COURT: He has, he's coming here and he says, you've held all the cards up to your chest. You haven't shown me a single card. Now, that's not the exercise of discretion that's contemplated here, when it says

'appears,' has to appear not only to -- in a sense to -- while the statute makes discretionary -- administrative officer, and has to appear to him, but that appearance to him has to be a reasonable appearance, and somebody's got a right to examine to see whether it's a reasonable appearance.

MR. ENSIGN: So long as he acts within his statutory authority, our position is that the Court has no power for judicial review, and so long, of course, as the statute is constitutional as it is."

We regret that the line of questioning did not return, and require of the appellee his answer to the Court's inquiry, "How do I determine whether he acted beyond his statutory authority?" The appellant gives his answer as follows: An official who bypasses the use of reasonable standards, as envisaged by Congress, for judging products under his jurisdiction is acting in an arbitrary and capricious manner and thereby exceeding his statutory authority.

Why should the FDA be held to reasonable standards and where do such standards come from?

In answer to the first question one might simply say "fairness." But the appellant, in addition, relies upon the law as follows:

Regarding the basis on which the coffee beans of this case were detained, the government in its briefs limits itself to a reading of Section 381(a). In these briefs it fails to mention that the actual basis of detention is found in previous passages of the FDC Act. In its original "Notice of Detention and Hearing," however, the government does

acknowledge that Section 342, not Section 381, contains the basis of detention when it states:

"Adulterated within the meaning of Section 342(a)(3)"[3]

Thus the legality of an import detention made by the FDA rests on its proper implementation of Section 342 as well as 381. On this subject the opinions of Justice Jerome N. Frank are instructive.

In *U.S. vs. 449 cases...Tomato Paste,* (C.C.A. 2d 1954) 212 F. 2d 567 concerning the application of Section 342(a)(3) to an allegedly adulterated product from Portugal, the appendix to Justice Frank's dissenting opinion gave a history of Section 342(a)(3) and he warned against the application of undisclosed standards in judging adulteration, in his opinion, supra, page 579:

> "Unhampered discretion of the type conferred by 21 U.S.C. §342(a)(3) is at best, insiduous. Possessed of such power, an official may stop the sale of perfectly good food merely because he happens not to like it.
>
> Such a possibility should cause courts like ours, when they can, to insist that administrative officers exercise wide discretionary powers only in accordance with any statutory provision which requires that they commit themselves to *properly publicized standards.* In that way, to some extent at least, can there be reconciled unavoidable delegation of exten-

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3. Other statutory provisions of the FD&C Act may be the basis of detention such as Section 502 (21 U.S.C. §352) requiring devices to be labeled with "adequate direction for use" in *Canadian Memorial Chiropractic College v. Shumate,* (W.D. N.Y., Civil 1966-189, July 26, 1967).

sive discretion to administrators with needed protection of the individual."
(Emphasis added.)

In *United States vs. 1,500 Cases*, 236 F. 2d 208, 211 (C.A. 7), 1956, the Seventh Circuit agreed with Justice Frank that the use of Section 342(a)(3) should be in accordance to reasonable standards:

> "The conclusion is inescapable that if we are to follow the majority of the decisions which have interpreted 21 U.S.C.A. Section 342(a)(3), without imposing some limitation, the Pure Food and Drug Administration would be at liberty to seize this or any other food it chose to seize. And there could be no effective judicial review except perhaps for fraud, collusion, or some such dishonest procedure. Such a position is not indefensible. Congress has obviously found it difficult, if not impossible, to express a definite statutory standard of purity that will receive uniform interpretation. And this court is acutely aware of the fact that it is not the proper body to more narrowly define broad standards in this area so that they can be applied in a particular case. Courts know neither what is necessary for the health of the consuming public nor what can reasonably be expected from the canning industry. Furthermore, this is not a determination that should be made individually for each case on the basis of expert testimony. The Food and Drug Administartion should set definite standards in each industry which, if reasonable, and in line with expressed Congressional intent, would have the force of law.
>
> Despite our limitations as a court and...Section 342(a)(3)..., we do not think that Congress intended to let the acts of the agency under this subsection go completely without limitation ...
>
> The spirit of...(sections of the FD&C Act)... demands that we give effect to what reasonable standards have been set by the Food and Drug Administration in the area involved in this case, and determine them as best we can where they have not yet been established..."

The appellant agrees with Justice Frank and the Seventh Circuit that "The FD&C Act should set definite standards in each industry which, if reasonable, and in line with expressed Congressional intent, would have the force of law." If the government were to establish standards for coffee, the validity and reasonableness of the standards could be reviewed under Section 701(3), (f) and (g) (21 *U.S.C.* 371(e), (f) and (g).) In the present situation the government sets no regulations which the court can examine and, through a claim of absolute discretion, seeks to avoid being bound by any standards at all. The appellant feels that this claim is contrary to the intent of Congress in writing Sections 401, 402 and 701 of the *FD&C Act*, as well as the cases cited above.

Regarding the second question above, as to the source of reasonable standards, the answer is that they may be developed either by government or by industry. Section 401 of the 1938 Act (21 *U.S.C.* 341) authorizes the government to promulgate regulations fixing reasonable standards of identity, quality, and fill of containers for most foods, including coffee, whenever "such action will promote honesty and fair dealing in the interest of consumers." Reasonable standards have been set regarding many foods, establishing guidelines which are an aid both to government and industry. However, in the case of coffee the government has promulgated no regulations fixing reasonable standards, and so both government and industry have looked to the standards established by the coffee industry.

A mistaken basis of the government's theory of absolute discretion is *Buttfield vs. Stranaham,* 192 U.S. 470 (1903) involving the *Tea Importation Act,* 29 Stat. 604 (1897) as amended, 21 *U.S.C.* §41 et seq. (1946) which had authorized the establishment of standards for the importation of teas. *Buttfield vs. Stranaham* involved an administrative refusal to admit into the United States a shipment of tea found by a board of general appraisers to be below certain *standards* authorized by the Tea Inspection Act. The court upheld the government on the basis that it had made a proper decision in accord with known standards. *The Court did not rule that Congress had vested the administrative agency with absolute discretion* to make determinations as to the admissibility of teas.

In *Waite vs. Macy,* 246 U.S. 606 (1918), the Supreme Court of the United States granted an injunction to a tea importer requiring the Tea Inspection Board to admit a shipment of tea which it had rejected. Since Section 6 of the *Tea Importation Act* required that regulations be in line with "the usages and customs of the tea trade," and the regulations which the government board had promulgated and acted upon did not meet this requirement, the court held that the government had exceeded its statutory authority. Both the *Waite vs. Macy* and the *Buttfield vs. Stranaham* decisions are based on a single premise; that the government's discretion over tea imports is limited to judging according to specific standards. Moreover, teas are excluded from the country only if the product

does not meet the minimum standards of the tea trade, *Macy vs. Brown*, (CCA-2, 1915) 224 Fed. 359, aff'd 246 U.S. 606 and *Macy vs. Loch*, (CCA-2, 1913) 205 Fed. 727.

D. SINCE TRIABLE ISSUES OF FACT EXISTED, THE GRANTING OF A SUMMARY JUDGMENT BY THE DISTRICT COURT WAS IMPROPER.

In *The James J. Hill*, 65 F. Supp. 265, 266-267, (D C. Md. 1946), complainant raised two issues: "(1) that there was no substantial evidence before the respondents (The FDA) that the wheat was unfit for food and that their action is therefore arbitrary and capricious; and (2) that the Federal Security administrator did not afford the plaintiff a fair hearing."

The District Court dismissed the second issue on a basis dealing with procedure.[4]

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4. The plaintiff's procedural difficulty came about as follows. A portion of a shipload of wheat, water-damaged enroute, was detained and a hearing held at which it was conceded that the wheat in its then condition was unfit for import. The owner subsequently made application to recondition the damaged wheat. He received permission to do so, and also instructions to report the proposed method of reconditioning and the purpose for which the wheat would be used. "It appears that the owner...did not make formal written application but did informally and by correspondence with the Administrator request the release of the wheat, then in process of being dried out, for use as poultry food...(Then) the owner requested a hearing by the Administrator with an opportunity to submit testimony 'as to the present condition of the damaged wheat and particularly on the question of the fitness of said wheat for animal foods'... The Administrator replied...that a hearing under the Act had already been given and that the request for the use of the wheat as poultry feed was denied and declined to accept the invitation to participate in...controlled feeding tests."

This case history, incidentally, is a good illustration as to why this appellant believes that the uniform procedures of the APA should be utilized in import determinations.

Regarding the first issue, the Court heard detailed scientific testimony from both the government and the owner as to whether the wheat was unfit for food.

The appellee in the instant case objects to the term *de novo* when applied to the *Hill* trial on the grounds that the ultimate purpose of hearing the testimony was to determine not the state of the wheat but if the government administrator had acted in an "arbitrary and capricious" manner. It is the appellant's view that the term *de novo* is properly applied because the total facts of the case were reviewed by the court. But to quibble over Latin terminology is beside the point; the crux of the matter is that the *Hill* case is one in which the issues were almost identical with those of the present case and in which the court did examine the facts of the case from its inception. The *Hill* precedent, then, presents a compelling argument as to the propriety of the District Court's having examined the following issues here:

1. Whether this importer received a fair hearing;
2. Whether there is no substantial evidence that the said coffee beans are unfit for food.

In actuality, the District Court did not consider any evidence that the said coffee beans were unfit for food (II R. 74) as shown by its statement:

> "...I'm going to admit all of the exhibits. In so doing, I do it with the following observation, that the admission of some of these exhibits, particularly the Government's exhibits that have to do with analyses made

> in Washington, analyses made in San Francisco, is not being admitted for the truth of what is contained therein, but as the basis for the action of the administrative officer. So that I'm admitting it...in that sense and for that purpose."

Nor did it take under consideration evidence that the coffee was fit. Part of this evidence took the form of the testimony of two coffee experts who testified at the hearing conducted by the FDA in the proceeding. W. L. McClintock testified (Appellant's Exhibit "I-1" page 42, lines 16 to 26) that the beans, in terms of flavor and color, was coffee and had commercial value. (See Appendix).

J. K. Dominguez, another expert, also testified (Appellant's Exhibit "I-1" p. 47, lines 14 to 26) that the beans were a coffee and had commercial value. (See Appendix).

Unquestionably the testimony of these two experts present triable issues. "Is the coffee a food within the FD&C Act" is a question that should have been determined after a full and complete proceeding in the District Court and not as has been done in this instance in a summary proceeding.

E. THE INSTANT CASE IS NOT AN UNCONTESTED SUIT AGAINST THE U.S.

The instant case was not an uncontested suit against the sovereign as respondents attempt to contend. It was, as has been previously demonstrated, an appeal from an adverse decision made by the FDA in derogation of rights granted appellant under the APA, and, further, an appeal for review based upon the provisions of the FD&C Act and the APA.

## CONCLUSION

This case basically concerns the most important matter of assuring that procedural safeguards are available when private citizens deal with their government. Regarding applying these procedural safeguards in the area of import determinations, *Willapoint Oysters Inc. vs. Ewing, et al.*, 174 F.2d 676, 686, cert. den. 338 U.S. 890 (1949) contains very pertinent commentary. The appellant concludes the presentation of his case with the following statement of the Ninth Circuit:

> "When it enacted the Administrative Procedure Act in 1946, with its review proceedings (5 U.S.C.A. §1009) Congress did not see fit to amend the provisions of the Food and Drug Act (21 U.S.C.A. §371) relating to the scope of review proceedings under the latter Act, and for this reason Circuit courts face the task of harmonizing the review provisions of both pieces of legislation. The review provision of both Acts are in *pari materia;* both relate to the same matter or subject, and it is our view that they dovetail and should be considered together and given effect..."

Dated: April 19, 1968, at San Francisco, California.

Respectfully submitted,

GEORGE McKRAY and
SHELDON I. BALMAN

GEORGE McKRAY

By _____
George McKray
Attorneys for Appellant

STATE OF CALIFORNIA ]
] No. 22,102
City and County of San Francisco ]

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GEORGE A. McKRAY

George A. McKray
Attorney for Appellant

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA ]
] No. 22,102
City and County of San Francisco ]

ROBERT L. JOHNSON, being duly sworn, says: That he is a citizen of the United States, over 18 years of age, not a party to the within action. This affiant's business address is 1255 Post Street, Suite 625, San Francisco, California. That affiant served copies of the attached APPELLANT'S REPLY BRIEF, on each of the following at their respective addresses by placing said copies in envelopes addressed as follows:

Cecil F. Poole
U.S. Attorney
Robert N. Ensign
Assistant U. S. Attorney
450 Golden Gate Avenue
San Francisco, Calif.
(3) copies

Arthur Dickerman, Esq.
FDA District Office
1521 W. Pico Blvd.
Los Angeles, Calif. 90015
(3) copies

which envelopes were then sealed and postage fully prepaid thereon, and thereafter were on April 19, 1968, deposited in the United States Mail at San Francisco. That there is delivery service by United States mail at the places so addressed, or regular communication by United States mail between the place of mailing and the places so addressed.

ROBERT L. JOHNSON

Robert L. Johnson

Subscribed and sworn to before me
this 19th day of April, 1968.

GRACE G. HACKETT

Grace G. Hackett, NOTARY PUBLIC
In and for the City and County of
San Francisco, State of California
My commission expires Feb. 9, 1971.

# APPENDIX

W. L. McClintock testified as follows. (See Appellant's Exhibits "I-1" page 42, lines 16 to 26.):

"Q. And you prepared and examined this coffee according to the accepted method of cupping in the coffee industry?

A. Yes.

Q. According to a *set* condition?

A. Yes. The standard that is recognized throughout the United States.

Q. Well, in your opinion, in terms of flavor and color, is this coffee?

A. Yes, indeed, it's coffee.

Q. Does it have commercial value?

A. Yes, it certainly has."

J. K. Dominguez, another expert testified as follows. (See Appellant's Exhibits "I-1" page 47, lines 14 to 26.):

"Q. And you were given some of the reconditioned coffee?

A. Yes, I was.

Q. And did you prepare and examine this coffee according to the accepted methods of cupping in the coffee industry?

A. Yes, I did.

Q. Do you consider this a coffee?

A. Yes, I do.

Q. Does it have commercial value?

A. Yes, it has commercial value."